In the Supreme Court of the United States

OCTOBER TERM 1977

No. 77-901

PAUL GORDON FRAKES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

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CITATIONS

CONSTITUTION

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The Petitioner, PAUL GORDON FRAKES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered March 18, 1977.

OPINION BELOW

The Court of Appeals entered its opinion on March 18, 1977. A copy of the opinion is attached hereto as Appendix A. On April 7, 1977, Petitioner Frakes filed a petition for rehearing with suggestion for rehearing en banc. This

petition was denied on December 2, 1977. A copy of the Order denying the petition is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the trial court prevented petitioner from presenting his sole defense to the charges against him and the court below ruled that this was error but did not affect his conspiracy conviction because of other substantial evidence against him, whether this ruling conflicts with his Sixth Amendment right to present a defense, decisions of this Court and of other circuits.

2. Whether the ruling of the court below upholding the constitutional validity of the wiretaps in this case conflicts with the Fourth Amendment, federal statutes and decisions of this Court, because:

a. The agents' complete recordation of all calls violated the Fourth Amendment and/or the minimization requirement of the order authorizing the wiretap and 18 U.S.C. § 2518(5);

b. The agents' preparation of allegedly "minimized" tapes for submission to the court demonstrated their ability to minimize, thus rendering their simultaneous, complete recordation a violation of the minimization requirement;

c. The agents' destruction of the set of wiretap tapes containing the complete recordation of each call violated the due process clause of the Fifth Amendment and/or the recordation/preservation requirement of 18 U.S.C. § 2518(8)(a);

d. The agents' destruction of the set of tapes containing the complete recordation of each call, their preparation

of allegedly "minimized" tapes for submission to the court, together with their initial "misleading" testimony constituted an attempt to perpetrate a fraud on the court and/or such grave misconduct that the wiretaps should have been suppressed on that ground.

3. Whether the ruling of the court below that the trial court did not err by its refusal to inquire of jurors whether they had read prejudicial newspaper accounts published while the trial was in progress conflicts with decisions of several other circuits and calls for the exercise of this Court's supervisory power to order a new trial.

4. Whether the ruling of the court below that the trial court did not err in amending the indictment on its face effectively overrules decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *United States Constitution*, Amendment IV.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." *United States Constitution*, Amendment V.

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial; . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." *United States Constitution*, Amendment VI.

". . . Every order . . . shall contain a provision that the authorization to intercept . . . shall be conducted in such

a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . ." 18 U.S.C. § 2518(5).

"The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. . . . They [the recordings] shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. . . ." 18 U.S.C. § 2518(8)(a).

"Any aggrieved person in any trial . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

(i) The communication was lawfully intercepted;

(ii) The order of authorization or approval under which is was intercepted is insufficient on its face; or

(iii) The interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a).

STATEMENT OF THE CASE

Petitioner Paul Gordon Frakes, along with eight others, was indicted on March 16, 1973 by the Grand Jury in the United States District Court for the Southern District of California in a six-count indictment charging violations of 21 U.S.C. § 841 and related sections of the Controlled Substances Act (1 R. 1-7).[1]

1. Abbreviation key: R. = Clerk's Record On Appeal; T. = Reporter's Transcript.

The bulk of the evidence against Frakes was derived from court-authorized wiretaps of the telephones of two co-defendants. Frakes, and the other defendants, filed motions to suppress the evidence obtained as a result of these wiretaps and these motions were heard by District Judge Gordon Thompson on eighteen court dates between October 26, 1973 and March 22, 1974 (See, generally, 7-24 T.). All motions were denied (29 T. 3979).

Frakes, and three co-defendants, were tried by jury between September 5 and November 8, 1974 (See, generally, 35-61 T.). Frakes was found guilty of all five counts in which he was charged and was sentenced to imprisonment for the maximum sentence on each count—a total of nineteen years (3 R. 907, 919; 3 R. 975).

The Ninth Circuit Court of Appeals reversed and remanded petitioner Frakes' judgment of conviction on four of the five counts and affirmed the judgment against him on the charge of conspiracy to import, distribute and possess with intent to distribute LSD (See Appendix A).

REASONS FOR GRANTING THE WRIT

1. The Trial Court Prevented Petitioner From Presenting His Sole Defense to the Charges Against Him. The Court Below Ruled That This Was Error But Did Not Affect His Conspiracy Conviction. This Ruling Conflicts With the Sixth Amendment, Decisions of This Court and of Other Circuits.

The heart of the government's case against petitioner consisted of three intercepted telephone conversations between co-conspirator Vladimir Petroff and petitioner (43 T. 1121, 1125-1127). These were admitted into evidence under the co-conspirator exception to the hearsay rule (55 T. 2602). In one of these conversations, Petroff told Frakes that "old Charlie" had "an acre" of "prime property for sale". The government contended in closing argument that

the word "acre" was a code word for LSD and that the conversation was strong evidence that Frakes and Petroff were co-conspirators in a conspiracy to traffic in contraband (58 T. 2932).

After the government concluded its case-in-chief, counsel for Frakes attempted to introduce into evidence some nineteen intercepted telephone conversations between Petroff and other persons for the purpose of explaining and putting into context the conversations which the government played (55 T. 2602-2614). Frakes' defense was that these conversations established that Petroff was engaged in legitimate real estate transactions and that "acres" actually meant acres of land and was not a code word for LSD, as the government contended. The trial court refused to admit the conversations on the ground that they were "clearly inadmissible hearsay" (55 T. 2608, 2612-2614). As Frakes' entire defense was to be based upon these conversations, he produced virtually no defense (55 T. 2614-29, 2639-41).

The Ninth Circuit Court of Appeals held that the district court's exclusion of the proffered tapes was error (Appendix, p. 13). The court stated:

> "Frakes had a right to argue to the jury Frakes' theory of the conversation upon which the government was building its case against Frakes.
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> • • •
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> "Whether or not Frakes could prove it, he had the right to use any available evidence to argue to the jury that the real estate language was not code language. The rejected tapes contained references to "lots", and, it could be argued, other words capable of relating to real estate transactions, as Frakes contended. The question was one for the jury. The exclusion of the tapes offered by Frakes denied him the right to present an important part of his defense, and was prejudicial error." (Appendix, p. 13).

Accordingly, the court reversed Frakes' convictions on all substantive counts.

The court, however, ruled that the conspiracy count "was not affected by the erroneous exclusion of the tapes and is fully supported by other evidence." After briefly describing this "other evidence", the court concluded, "There is no way the excluded evidence could have helped Frakes rebut the conspiracy case." (Appendix, p. 14).

The Ninth Circuit, taking over the function of the jury, in essence ruled that Frakes was erroneously deprived of an opportunity to present a defense but that this error was harmless with respect to the conspiracy charge because that charge was supported by other evidence. The court seems to be saying that the prosecution's case-in-chief in certain criminal trials may be so strong that the court may restrict the defendant from presenting a defense without reversible error occurring.

The court's opinion conflicts directly with an accused's rights under the Sixth Amendment of the United States Constitution and a long line of opinions of this Court interpreting it.

As early as 1897, this Court wrote that "where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary, or contradict it." *Carver v. United States*, 164 U.S. 694, 697 (1897).

In *In re Oliver*, 333 U.S. 257, 273 (1948), this Court stated, "A person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence."

In *Washington v. Texas,* 388 U.S. 14, 19 (1967), the Court noted that "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law."

In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Court wrote that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." 410 U.S. at 294. The Court also stated, "Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

Finally, the Court stated in *Faretta v. California,* 422 U.S. 806, 818 (1975), "In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."

The ruling below, effectively denying petitioner his constitutional right to defend himself against the serious felony charge of conspiracy, flies in the face of each of the above-cited cases and of all cases of this Court which interpret the Sixth Amendment.

In addition, the opinion conflicts with cases from other circuits. See, e.g., *United States v. De Loach,* 164 U.S. App. D.C. 116, 504 F.2d 185, 191 (1974), *cert. denied,* 426 U.S. 909 (1976), in which the trial judge prevented defense counsel from presenting his theory of the case to the jury in his closing argument. The D.C. Circuit stated in reversing the judgment of conviction, "whether this argument would have

convinced the jury cannot be known. But the theory had support, however fragmentary, in the record, and without it [defendant] was 'deprived of the substance of his defense.'" Similarly, the Fifth Circuit in *United States v. Paquet,* 484 F.2d 208 (1973), reversed a conviction because the defendant was prohibited from telling the jury his interpretation of a conversation which had been introduced by the government. The court noted that "the defendant was entitled to present his version of the entire conversation. The prosecution cannot give its version of a matter and thereafter muzzle the defendant." 484 F.2d at 211. See also *United States v. Segal,* 534 F.2d 578, 582 (3d Cir. 1976).

The right of an accused to present a defense is so basic and fundamental a constitutional right that its complete denial, as occurred here, can never be considered harmless beyond a reasonable doubt. This Court in *Chapman v. California,* 386 U.S. 18, 23 (1967), observed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." The Court listed three examples,[2] but never declared this list to be exclusive.

This Court has ruled that a denial of the related and equally-basic Sixth Amendment right of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska,* 415 U.S. 308, 318 (1974); *Smith v. Illinois,* 390 U.S. 129, 131 (1968); *Brookhart v. Janis,* 384 U.S. 1, 3 (1966). Several commentators have suggested that this is the type of constitutional error that goes to the very heart of the guilt-determining process,

2. These examples are: admission into evidence of a coerced confession, denial of the right to counsel, and trial by a biased judge. See 386 U.S. at 23 n. 8.

is inherently prejudicial, and should result in automatic reversal.[3]

Petitioner respectfully urges this Court to grant this petition to bring the Ninth Circuit Court of Appeals in line with the previously-cited line of cases of this Court which recognizes the fundamental importance of an accused's constitutional right to present a defense to the government's criminal indictment against him.

2. Whether the Ruling of the Court Below That the Conduct of the Agents Who Conducted the Wiretaps Did Not Violate the Fourth Amendment or the Minimization Standards of 18 U.S.C. § 2518(5) Conflicts With Decisions of This Court, and Whether This Case Should be Consolidated With Scott v. United States, Presently Before This Court.

Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, the government in January 1973 sought and was granted authority to wiretap the telephones of two co-conspirators in the instant case. Government agents wiretapped those telephones for twelve days and introduced the tapes of those wiretaps in the trial below.

The government made three sets of tapes of each conversation from three different recording machines. The first two sets of tapes were sealed and sent to the district court

3. "To deny unconstitutionally a defendant the opportunity to summon witnesses is an error which cannot fairly be found to be 'harmless beyond a reasonable doubt', because it is impossible to ascertain what the testimony of the witnesses would have been had they been summoned."

Mause, *Harmless Constitutional Error: The Implication of Chapman v. California,* 53 MINN.L.REV. 519, 542-543 (1969).

"[E]rrors which concern the basic 'trial machinery'—the mechanism for assembling evidence and the mechanism by which it is assessed—should call for automatic reversal." Note, *Harmless Constitutional Error: A Reappraisal,* 83 HARV.L.REV. 814, 821 (1970).

and the U.S. Attorney's office. These two sets of tapes were "minimized" in the sense that not every conversation was recorded in its entirety. However, defense counsel discovered prior to trial that the tapes from the third machine, unlike the "sanitized" tapes submitted to the court, ran continuously *and were never minimized* (22 T. 2827—23 T. 2990).[4]

Only three tapes remain from the third machine. Each contains the *complete* recordation of *every* conversation including those that were only partially recorded (i.e. "minimized") on the "sanitized" court tape. The other tapes from the third machine were not preserved. The three tapes which remain had been retained by accident; the government had not intended to retain any of the tapes from the third machine.

The issues involving minimization presented here are similar to those raised in *Scott v. United States,* a case in which this Court granted a petition for a writ of certiorari on October 11, 1977. No. 76-6767, ... U.S. ....., 98 S.Ct. 261. In *Scott,* the petitioners asserted that the agents made no good faith effort to minimize. In the instant case, the agents "minimized" on the court tape and another but not on a third tape. Here, the agents, by their conduct with respect to the court tape, demonstrated that they *could have minimized.* Petitioner Frakes respectfully suggests that the Court should consider joining this case with *Scott* for argument and decision.

4. Prior to defense counsels' production of one of the tapes from the third machine (Pre-trial Court Exhibit 21, which contained the complete recordation of each call, even those calls that were only partially recorded on the tape submitted to the court), government personnel denied that they had used the third machine to record each call in its entirety (9 T. 1120, 1124, 1125, 1127, 1225, 1230, 1231; 10 T. 1274, 1275, 1293, 1296-1298; 11 T. 1429, 1430; 12 T. 1520, 1523, 1524, 1525).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is a major new federal statute and this Court has granted certiorari to review portions of it for that reason. See, e.g., *United States v. Donovan,* 429 U.S. 413, 422 (1977); *United States v. Kahn,* 415 U.S. 143, 150 (1974). Moreover, previously this Court has specifically noted that minimization issues have not been before it. *United States v. Giordano,* 416 U.S. 505, 525 fn. 13 (1974); *United States v. Chavez,* 416 U.S. 562, 569-570 n. 3 (1974).

It is important that this Court review the ad mixture of minimization and recordation/preservation issues presented by the instant petition in order to clarify for the American public, prosecutors and law enforcement officers the guidelines that should be used. Lack of enforcement of the minimization requirement (18 U.S.C. § 2518(5)) will render unauthorized wiretaps into general warrants; lack of enforcement of the recordation/preservation requirement (18 U.S.C. § 2518(8)(a)) will render nugatory *inter alia,* the minimization requirement.

The opinion below is in conflict with the Fourth Amendment of the United States Constitution and this Court's opinions in *Berger v. New York,* 388 U.S. 41 (1967); *Osborn v. United States,* 385 U.S. 323 (1966); *Stanford v. Texas,* 379 U.S. 476 (1965), and *Marron v. United States,* 275 U.S. 192 (1927), as well as the due process clause of the Fifth Amendment of the United States Constitution and this Court's decision in *United States v. Augenblick,* 393 U.S. 378 (1969).

These matters of minimization, recordation and preservation must be decided by this Court at the earliest opportunity. Law enforcement officials need guidelines set by this Court and the American public needs to feel secure that abuses of this intrusive investigative device will not be

tolerated. Moreover, it is urged that the opinion below sanctioned such a serious departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

For all of the reasons above set forth, it is respectfully submitted that this Court should grant this petition and join the instant case with *Scott* for argument and decision.

3. The Ruling of the Court Below That the Trial Court Did Not Err in Its Repeated Refusal to Inquire of Jurors Whether They Had Read Prejudicial Newspaper Accounts Published While Trial Was in Progress Conflicts With Decisions of Several Other Circuits and Calls for the Exercise of This Court's Supervisory Power to Order a New Trial.

At least six articles directly or indirectly related to the case at bench appeared in local newspapers during its trial in San Diego. All contained inadmissible evidence. Two referred to the case as the "largest LSD seizure ever made in the United States" and "the largest LSD case ever prosecuted in this country." Defense counsel requested on a number of occasions during the trial that the judge inquire of the jurors if any of them had read or been told about the articles and later moved for a mistrial because of the articles (36 T. 18-19, 23; 47 T. 1806-1808; 55 T. 2554). The judge denied all requests (36 T. 19; 47 T. 1805; 55 T. 2592).

The Ninth Circuit ruled that, although the contents of most of the articles was irrelevant and inadmissible, the trial judge did not abuse his discretion and there was no prejudice (Appendix A, pp. 20-21).

This ruling conflicts with the opinions of at least *six* other circuits. For example, the Seventh Circuit in *Margoles v. United States,* 407 F.2d 727, 735, *cert. denied,* 396 U.S. 833 (1969), ruled that "the procedure required by the Circuit where prejudicial publicity is brought to the court's attention during trial is that the court *must ascertain* if

any jurors who had been exposed to such publicity had read or heard the same." (Emphasis in original). Similar rulings were announced in *Calo v. United States,* 338 F.2d 793, 795 (1st Cir. 1964); *United States v. Pomponio,* 517 F.2d 460, 463 (4th Cir. 1975); *United States v. Hankish,* 502 F.2d 71 (4th Cir. 1974); *Adjmi v. United States,* 346 F.2d 654, 659 (5th Cir.), *cert. denied,* 382 U.S. 823 (1965); *Marson v. United States,* 203 F.2d 904, 909-911 (6th Cir. 1953); *Coppedge v. United States,* 106 U.S. App. D.C. 275, 272 F.2d 504, 508 (1959).[5] In fact, the opinion below conflicts with a prior decision of the Ninth Circuit in *Silverthorne v. United States,* 400 F.2d 627, 642 (1968).

Moreover, and very significantly, the court's ruling prohibits any further inquiry into whether an important constitutional right of the accused has been violated. This Court has ruled that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross examination, and of counsel." *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965). Because the trial judge refused to make any inquiry whatsoever as to whether any juror had seen any of the articles, it is impossible to ascertain whether one or more jurors had read an article and had been influenced thereby.[6]

5. See also The American Bar Association's Standards Relating to Fair Trial and Free Press, Section 3.5(f).

6. It is significant that District Judge Thompson's standard admonition, given prior to each recess in the lengthy trial, *did not include* an instruction to refrain from reading newspapers (See, e.g., 35 T. 54, 196; 37 T. 365; 38 T. 468). On one of the days that defense counsel complained of prejudicial articles (47 T. 1803-1805), the court did, at the close of the session, make reference to newspapers in its admonition, but even then, it did not forbid the jurors to read articles concerning the trial, but only said that "it is *all to your benefit* not to view any of the news broadcasts or listen to any news broadcasts or observe any reports by the newspapers. . . ." (47 T. 1894) (Emphasis supplied.)

Of course, the petitioner would be entitled to a new trial if a prejudicial article had reached a juror and it had influenced his verdict. See *Marshall v. United States,* 360 U.S. 310 (1959). *See also Sheppard v. Maxwell,* 384 U.S. 333 (1966).

In order to resolve the conflict among the various courts of appeal and to give much-needed instructions to lower court judges regarding their duties and obligations when the possibility of prejudicial media articles or broadcasts is present, this Court should grant this petition and reverse petitioner's judgment of conviction under its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." See, e.g., *Marshall, supra,* 360 U.S. at 313.

4. The Ruling of the Court Below That the Trial Court Did Not Err in Amending the Indictment Effectively Overrules Decisions of This Court.

Count one of the indictment in the case at bench alleged that Frakes and others "did knowingly and intentionally combine, conspire and agree together with each other . . . to knowingly and intentionally import, distribute and possess with intent to distribute LSD. . . ." (1 R. 1).

At the conclusion of the government's case, counsel for Frakes moved for a judgment of acquittal on the ground that the government failed to prove importation of LSD. The district court agreed that there was no evidence of importation but denied the motion and struck the word "import" from the face of the indictment (55 T. 2547-50, 2573-92). The Court of Appeals admitted that this action was "awkward" but held that it "did not create a reversible error." (Appendix A, p. 18).

This ruling in effect overrules a line of decisions of this Court, commencing with *Ex Parte Bain,* 121 U.S. 1 (1887),

which held that a trial court may never alter or amend an indictment. This Court has since ruled that typographical errors or true and obvious surplusage may be stricken or corrected. See, e.g., *Ford v. United States*, 273 U.S. 593, 602 (1926); *Salinger v. United States*, 272 U.S. 542 (1926). But this Court has continued to adhere to the basic principle of *Bain* and has reaffirmed the rule prohibiting any significant amendment in a series of decisions. See, e.g., *Russell v. United States*, 369 U.S. 749, 770-771 (1962); *Stirone v. United States*, 361 U.S. 212, 217 (1960).

The opinion of the court below also conflicts with decisions of at least one other circuit which has strictly interpreted the *Bain* principle. See *United States v. Somers*, 496 F.2d 723, 744 (3d Cir. 1974).

The rationale for the *Bain* principle is that, if an indictment is amended, "the defendant is not tried on the indictment of the grand jury, as is his constitutional right under the Fifth Amendment, but on different charges, and there is no way of knowing whether the grand jury would have returned the indictment if given the opportunity." *Heisler v. United States*, 394 F.2d 692, 695 (9th Cir.) *cert. denied*, 392 U.S. 986 (1968).

The trial court's action here prejudiced petitioner. The stricken word was not mere surplusage. During a pretrial motions hearing one year prior to trial, the district judge advised all counsel in the case (although referring specifically to another defendant) that "this court would require that the government prove . . . the way this Indictment is alleged . . . that your client conspired to do all three of these acts [import, distribute, and possess with intent to distribute]. Anything short of that would be under this pleading one insufficient for a conviction." (2 T. 162-163). The judge's action of striking the word "import" directly

contradicted this statement. Regardless of whether the earlier statement was correct law, all defendants, including petitioner, relied to their detriment upon it. (See, e.g., 36 T. 47, 49-50; 55 T. 2547-50, 2573-92).

This Court should grant this petition to resolve the confusion surrounding *Bain* and its progeny and to provide guidance to trial court judges regarding amendment of indictments.

CONCLUSION

For the foregoing reasons, petitioner Paul Gordon Frakes respectfully suggests that a writ of certiorari should issue in this case.

Dated: December 22, 1977.

Respectfully submitted,

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By GILBERT EISENBERG
Attorneys for Petitioner

Appendix A

UNITED STATES OF AMERICA,
Appellee,

v.

MANUEL GLENN ABASCAL, *Appellant.*
UNITED STATES OF AMERICA,
Appellee,

v.

PAUL GORDON FRAKES, *Appellant.*
Nos. 75-1093 and 75-2052.
United States Court of Appeals,
Ninth Circuit.
March 18, 1977.

OPINION

GOODWIN, Circuit Judge:

Paul Gordon Frakes and Manuel Glenn Abascal were convicted of multiple counts of violating 21 U.S.C. § 841 and related statutes which denounce possession and distribution of certain drugs, as well as conspiracy to engage in illegal drug transactions. Their combined appeals present a number of issues common to both appellants, and others that relate to each one individually.

An enterprise distributing large quantities of LSD, involving as many as fifteen suspects, was discovered when an undercover agent of the San Diego County district attorney's office, posing as a purchaser, developed a contact with Clarence "Pee Wee" Batchelder, a suspected dealer in various illicit drugs. Batchelder's activities indicated that his supplier was Vladimir Petroff. The agents obtained wiretap orders and monitored the telephones of both Batchelder and Petroff. The monitored conversations led the agents to believe that Frakes was a partner of Petroff, and that Abascal was active in the distribution network in Northern California.

In due course, Batchelder was arrested in the act of selling LSD, and Petroff was arrested at his house in San Diego. Frakes was arrested a short time after the arrest of Batchelder and Petroff. A quantity of evidence which is material in this appeal was seized in connection with Petroff's arrest.

Meanwhile, another team of agents in the Berkeley-East-Bay area staked out Abascal's house. A few days after Petroff and Batchelder were arrested, agents in Lafayette arrested Kathy Shull as she drove away from Abascal's house in his black Cadillac. In the Abascal Cadillac the agents found a substantial quantity of LSD marked and packaged in the same manner as that found in San Diego in the possession of Batchelder and Petroff.

I. THE WIRETAPS

(a) *Standing*

[1] The trial, which followed lengthy pretrial proceedings, took eight weeks. Much of the government's evidence was derived from the tap on the Petroff telephone. Abascal had participated in seven of the monitored calls, and Frakes in three. All but one of these calls were referred to in the evidence. Accordingly, the appellants have standing to challenge the legality of this wiretap. *United States v. King,* 478 F.2d 494, 506 (9th Cir.), *cert. denied,* 414 U.S. 846, 94 S.Ct. 111, 38 L.Ed.2d 94 (1973), and 417 U.S. 920, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).

(b) *Necessity*

[2, 3] Abascal and Frakes assert that the government's applications for the wiretap did not satisfy 18 U.S.C.

§ 2518(1)(c).[1] The cited section emphasizes the objective of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.,* that wiretaps are "not to be routinely employed as the initial step in criminal investigation." *United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 1827, 40 L.Ed.2d 341 (1974); *United States v. Kahn,* 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). Nevertheless, the statute is to be interpreted "in a practical and commonsense fashion." S.Rep.No.1097, 90th Cong. 2d Sess. 1968, U.S. Code Cong. & Adm.News, pp. 2112, 2190. Consequently, the government must show only that alternative means are likely, not certain, to fail; *i. e.,* a wiretap need not be resorted to only as a last resort. *United States v. Smith,* 519 F.2d 516 (9th Cir. 1975); *United States v. Kerrigan,* 514 F.2d 35, 38 (9th Cir.), *cert. denied,* 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249 (1975). *See also United States v. Vento,* 533 F.2d 838, 850 (3d Cir. 1976).

[4] Section 2518(1)(c), requires the government to make a particularized showing in each case of the improbability of success or high degree of danger from the use of alternative investigative techniques. The government must do more than merely characterize a case as a "gambling conspiracy" or a "drug conspiracy" or any other kind of case that is in general "tough to crack". *United States v. Kalustian,* 529 F.2d 585, 589 (9th Cir. 1975); *United States v. Kerrigan,* 514 F.2d at 38. *But see United States v. McCoy,* 539 F.2d 1050, 1056 (5th Cir. 1976). *Cf. United States v. Scully,* 546 F.2d 255, 260-261 (9th Cir. 1976).

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1. 18 U.S.C. § 2518(1)(c) specifies that each application for a wiretap must contain:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[5] There is, of course, little doubt of the sufficiency of the affidavits supporting the Batchelder tap. Batchelder had discovered that he was under surveillance and had turned "wary". (Batchelder was involved in a complex network of marijuana smuggling and distribution in addition to the LSD conspiracy.) Batchelder had refused to allow the undercover agent to deal directly with any of his drug sources. The agents knew from their nonelectronic investigation that wiretaps would generate significant new evidence from Batchelder, but that nothing else would be productive. On Petroff, the record was similar, but nonelectronic techniques had produced little.

[6, 7] The wiretap statute requires that § 2518(1)(c) be satisfied with regard to each separate wiretap. Thus a showing of need for the Batchelder wiretap would not necessarily justify the need for the Petroff wiretap. It is not enough that the agents believe the telephone subscribers they wish to tap are all part of one conspiracy. Less intrusive investigative procedures may succeed with one putative participant while they may not succeed with another. Here, however, we are satisfied that the supporting affidavits were sufficient to justify the Petroff tap. The government, upon discovering that Petroff was probably Batchelder's source, had undertaken an extensive "paper" investigation of Petroff. His lengthy criminal record was soon supplemented by a mass of false personal data Petroff had given to various agencies in an apparent effort to avoid being traced. Also found were telegrams to Europe and telephone toll records indicating a call to a woman in New Orleans who had a California LSD arrest record. During the investigation Batchelder had indicated both that he thought Petroff was manufacturing the drug and that it was being imported from Europe and smuggled through a bribed Customs agent. Agents were entitled to check both theories.

Professionally packaged drug containers obtained from Batchelder were circulated to a variety of law enforcement agencies, but these samples produced no new leads. Batchelder's refusal to allow the undercover agent to deal directly with Petroff made it impossible for agents to move upward from within the conspiracy. No other informants that could have been of any assistance were known. Even if Batchelder had known something about the operations beyond Petroff, the government would have jeopardized its entire investigation by pressing Batchelder for more information.

The agents had, therefore, substantial reason to believe, at the time they requested the wiretap, that Petroff was in the middle of an extensive drug conspiracy with international dimensions. It was also clear that the telephone was the principal means of communication of the conspirators. Petroff's known record and activities had shown him to be wary of surveillance and adept at avoiding it.

[8] This is not a case of "boilerplate" allegations true of drug conspiracies in general and held not to be sufficient in *Kalustian*. Here, the affidavit etched the nature and contours of *this* conspiracy and the nature and extent of this investigation up to the requesting point with enough particularity to allow a judge reasonably to ascertain that continued use of ordinary surveillance probably would be fruitless. The wiretap orders were valid. *United States v. Spagnuolo,* slip opinion p. 190, ... F.2d .... (9th Cir., March 4, 1977).

(c) *Minimization*

Claiming a systematic failure by the agents monitoring the Petroff and Batchelder wiretaps to comply with the minimization requirements of 18 U.S.C. § 2518(5), Frakes and Abascal also sought total suppression of the wiretap evidence on this ground.

The government argued that these defendants had standing to challenge minimization only as to their own calls; that the monitoring agents had made a good-faith, if not completely successful, effort to limit interception; and that, assuming a failure to minimize, total suppression was not an appropriate remedy. Following a fourteen-day evidentiary hearing and the submission of briefs, the district court denied the motion to suppress. This ruling was correct.

[9] On the facts of this case the agents reasonably could have recorded all the monitored calls during the twelve-day life of the wiretaps.[2] We need not, therefore, fix abstract limits of standing to complain about minimization or discuss what might be appropriate relief under 18 U.S.C. § 2518(5) if minimization were not properly carried out.

[10] The standard of minimization is reasonableness. Reasonableness must be determined from the facts of each case. *United States v. Chavez,* 533 F.2d 491 (9th Cir.), *cert. denied,* 426 U.S. 911, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976);

2. The government made three tapes of each conversation. The first two were sealed immediately and sent to the court and the United States Attorney's office. The government says the third tape was used to aid in the making of synopses of the calls. Each tape was allegedly used many times, thus automatically erasing the underlying recordings. Appellants assert that the third tape, unlike the "santized" versions, ran continuously and was never minimized. Given our holding, we need not decide the actuality or the propriety of this procedure. We note, however, that while 18 U.S.C. § 2518(8)(a) permits the making of duplicate recordings "for use or disclosure," it also dictates that authorized recording "be done in such way as will protect the recording from editing or other alterations," requires that authorized recordings be made available to the judge and sealed under his directions immediately upon the expiration of the period of the order, and forbids their destruction except upon order of the court. We leave to another time the issue of whether these latter requirements apply to tapes made for use as well as for disclosure. But it should be obvious that arrangement of recorders as in this case, involving as it does the destruction of almost the entire third recording, makes difficult the enforcement of the minimization requirement.

United States v. Scott, 170 U.S.App.D.C. 158, 516 F.2d 751, 755, *cert. denied,* 425 U.S. 917, 96 S.Ct. 1519, 47 L.Ed.2d 768 (1976).

[11] In assessing reasonableness in this case, it is significant that the life of the wiretaps was very brief. The officers were investigating a large-scale drug ring in which the existence but not the identity of coconspirators was known. *See United States v. Turner,* 528 F.2d 143, 157 (9th Cir. 1975). Once a pattern of innocent calls develops, of course, those monitoring have a duty to terminate their recording of such calls. *United States v. Chavez,* 533 F.2d at 494; *United States v. Armocida,* 515 F.2d 29, 42-43 (3d Cir.), *cert. denied,* 423 U.S. 858, 96 S.Ct 111, 46 L.Ed.2d 84 (1975). In this instance, however, the agents were hampered not only by the short life of the tap authority and the uncertain identities of those involved, but by the often guarded language used on the telephone.

[12] The conversing conspirators frequently discussed non-narcotic-related matters at the beginnings of conversations, and often resorted to jargon and code words, a frequent practice in narcotics dealings. *United States v. Chavez,* 533 F.2d at 494; *United States v. Turner,* 528 F.2d at 157-58. Considering the totality of the circumstances, the recording of all the monitored calls in this case was not a violation of the minimization requirements.

In light of our determination that there was no failure of minimization, we need not reach the question whether the government's Manual on Electronic Surveillance was discoverable by defendants. *See United States v. King,* 335 F.Supp. 523, 541 (S.D.Cal.1971), *reversed in part on other grounds,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974). The unavailability of the manual in this case could not have constituted reversible error in any event.

II. SEARCH AND SEIZURE

(a) *Abascal's Automobile*

Agents began their surveillance of Abascal's residence on the evening of March 8, 1973. The next day, agents stopped Abascal's Cadillac with the results already noted. Abascal asserts five defects in the search of his Cadillac: (1) the search could not be sustained under 19 U.S.C. § 1595a because the officers did not have probable cause to believe that the Cadillac contained imported contraband; (2) the officers did not have probable cause to believe that the car contained LSD on March 9, 1973; (3) the search does not fit within any exception allowing warrantless searches; (4) if there was probable cause to search the car, the agents had sufficient time to secure a warrant; and (5) if probable cause did exist, it was tainted by an alleged illegal prior search.

[13] We need not decide whether there was probable cause to believe that the contraband in the Cadillac was illegally imported so as to legalize warrantless seizure under 19 U.S.C. § 1595a. The search made here was proper under the moving vehicle exception. Under this exception all that is required to stop and search an automobile on the highway is probable cause to believe that it contains any type of contraband. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The search is justified by exigent circumstances because "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained • • •." *Chambers v. Maroney,* 399 U.S. at 51, 90 S.Ct. at 1981.

[14] The agents had probable cause to believe on the day of the search that the Cadillac then contained LSD. Shelly Federgreen, an acquaintance of Abascal, was contacted by agents after they found her number in Frakes' telephone notebook. In a sworn statement at her attorney's office on March 8, 1973, Federgreen said that Abascal had been at her residence on March 5, with a wine crate containing four large plastic bottles with smaller glass vials labeled "Golden Hornet". Abascal told her it was LSD worth about $15,000,000. According to Federgreen, Abascal left the LSD in her apartment overnight, returned March 6, placed the plastic containers in an orange flight bag provided by her, and, with the bag, left in his Cadillac. Federgreen gave the agents Abascal's phone number and address in Lafayette and told them he had a girl griend in Berkeley named Kathy.

Agents placed the Lafayette residence under surveillance. On the morning of March 9, a woman later identified as Kathy Shull drove, with a dog, in a Porsche automobile from Abascal's Lafayette house to the Berkeley campus. The woman left the dog tied to the Porsche, eluded surveillance by entering a classroom building, and returned to the Lafayette house in another car with her brother. The woman then backed the black Cadillac out of the garage and drove off, only to be stopped a few blocks away by other agents who had not been decoyed by her evasive conduct in Berkeley.

On March 8, the agents not only had the benefit of Shelly Federgreen's detailed and reliable statements of March 6; they also had Kathy Shull's trip to Berkeley and return to Lafayette to contemplate. The agents had abundant probable cause to believe that contraband was in the Cadillac when they stopped the car. *See United States v. Hills,* 464 F.2d 1023 (9th Cir. 1972).

[15] Abascal claims that agents delayed too long their search of the car. He argues that once they had probable cause, the agents could not evade the warrant requirement by failing to obtain a warrant and simply awaiting the arrival of exigent circumstances. *But cf. Cardwell v. Lewis,* 417 U.S. 583, 595, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). It should be obvious from the facts outlined, however, that whether or not a warrant might have been issued earlier on the basis of the Federgreen statement, new probable cause clearly came into the investigation when Kathy Shull attempted to evade surveillance and flee with the Cadillac. There is no rule that officers must strike the instant they have probable cause. *See United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

[16] Abascal also claims that the evidence seized from his Cadillac was tainted by the agents' alleged trespass on his residential property. He says the agents first looked through the garage window and then searched the Cadillac while it was parked in the garage during their surveillance of his residence. Whether the alleged observations and search actually took place is immaterial in this case because independent probable cause to search the moving Cadillac on March 9 came from information wholly untainted by any prior investigation of the garage. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Brandon,* 467 F.2d 1008 (9th Cir. 1972); *United States v. Bacall,* 443 F.2d 1050 (9th Cir.), *cert. denied,* 404 U.S. 1004, 92 S.Ct. 565, 30 L.Ed.2d 557 (1971).

There was no error with respect to the evidence against Abascal.

(b) *Search of the Petroff Residence*

[17] Frakes seeks to challenge the warrant issued for the search of the Petroff residence. Because Frakes was

charged with possession of the LSD seized at the Petroff residence, he has standing to move for its suppression. *United States v. Boston,* 510 F.2d 35, 37 (9th Cir. 1974), *cert. denied,* 421 U.S. 990, 95 S.Ct. 1994, 44 L.Ed.2d 480 (1975). Frakes had no standing, however, to move to suppress the other items seized from Petroff's house. Frakes was not present at the time of search, and he has asserted no possessory or proprietary interest in the residence searched or other items seized. *See Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973).

[18] The search warrant was properly issued, worded, and executed. Insofar as it covered the subject LSD, it was sufficiently specific and the affidavit underlying the warrant provided ample probable cause. There was no error in denying Frakes' motion to suppress.

III. EXCLUSION OF FRAKES' PROFFER AS HEARSAY

In his telephone conversations with other conspirators, Petroff frequently referred to the existence of a "compadre", a "socio", or "partner". Starting January 12, 1973, Petroff began arranging with Abascal and an as yet unidentified supplier the purchase of an illicit commodity referred to usually as an "acre". It appears from the coded language used by Abascal at one point and references to "auxiliary materials" that the substance was ergotamine tartrate. In conversations with Abascal and the supplier, Petroff repeatedly stressed that he must receive approval from his partner for the purchase, and in another conversation actually identified this person as "Paul".

On January 14, Petroff told Abascal that he had tried to call his partner earlier that day but could not reach him. Telephone records indicated that he had called Frakes'

number that day but received no answer. Immediately after concluding his conversation with Abascal, Petroff called Frakes and told him that he "had a small decision to make." He asked him if he remembered "old Charlie", and said "old Charlie" had an "acre" for sale at twenty-five, a savings of ten. Frakes protested that "we can't afford it", but Petroff insisted that it was too good a deal to pass up. Frakes also made a reference at one point to a "business like ours", and the two discussed the problem of some unnamed others "screwing up our market." Throughout the entire conversation, Frakes expressed uneasiness about using his telephone, and finally Petroff offered to complete the discussion from pay phones. Petroff was then observed going to a nearby public phone booth and making two calls.

The January 14 telephone conversation between Frakes and Petroff was, therefore, vital evidence. The call established Frakes' relationship with Petroff and consequently his constructive possession and distribution of the LSD found in Petroff's house and that sold by Batchelder to the undercover agent. That conversation was also the basis of the charge under 21 U.S.C. § 843(b) that Frakes knowingly and intentionally used a telephone to facilitate the commission of crime (the conspiracy). Essential to the government's case was its argument that real estate terms such as "acre" and "lot", used in that conversation as well as in other conversations between Petroff and alleged conspirators, were code words for LSD or ergotamine tartrate.

Faced with the wiretap evidence of this January 14 conversation, Frakes attempted to introduce other tape-recorded conversations from the same wiretap between Petroff and nonconspirators. The conversations offered by Frakes allegedly dealt with other business transactions. Frakes offered these conversations to rebut the government's inference that the January 14 Frakes-Petroff conversation was about LSD rather than about real estate.

The district court excluded the offered tapes of other conversations as hearsay. This was error.

[19, 20] Out-of-court statements are excludable hearsay if offered to prove the truth of the matter asserted in them. Fed.R.Evid. 801(a), (c). But the truth of any assertions in the conversations Petroff had on the telephone is immaterial to this case. Frakes did not offer the conversations to prove the truth of any assertions therein, but rather to show a pattern of Petroff's verbal behavior on the telephone that was consistent with Frakes' argument that the January 14 call was about an innocent real estate deal. Frakes had a right to argue to the jury Frakes' theory of the conversation upon which the government was building its case against Frakes.

The government's portion of the tape included words commonly used in discussing real estate transactions. The government claimed these words were code words for drug quantities and prices. Frakes claimed these words (lots, acres, and price quotations) were not code words at all, but actually were routine communications about real estate deals. Whether or not Frakes could prove it, he had the right to use any available evidence to argue to the jury that the real estate language was not code language. The rejected tapes contained references to "lots", and, it could be argued, other words capable of relating to real estate transactions, as Frakes contended. The question was one for the jury. The exclusion of the tapes offered by Frakes denied him the right to present an important part of his defense, and was prejudicial error.

Frakes' convictions on the substantive counts, including the count for misuse of the telephone, must be reversed and remanded.

IV. SUBSTANTIAL EVIDENCE OF CONSPIRACY

The conspiracy count, however, was not affected by the erroneous exclusion of the tapes and is fully supported by other evidence.

[21] Coded notebooks linked Frakes and Petroff with each other and with Abascal. A list of European chemical companies which manufactured ergotamine tartrate, a chemical compound used in the manufacture of LSD, was seized at Petroff's residence. It was in Frakes' handwriting. In a passport application Petroff listed Frakes' telephone number as his own. Frakes' telephone notebook contained the number of Shelly Federgreen, a friend of Abascal. The same number was found in Petroff's telephone notebook as a number for "Mick" (a nickname used by Abascal). When Petroff's home was searched on January 22, 1973, in addition to the list of Frakes' handwriting agents also found a coded notebook which, when deciphered, was found to contain Frakes' telephone number.

Excluding the actual content of the January 14 call, the events preceding it provide additional links between Frakes and the conspiracy. Following the call, moreover, Petroff flew from San Diego to meet with Abascal at a restaurant in Los Angeles and, after leaving the restaurant, took a taxicab to Frakes' house where Petroff spent two hours. There is no way the excluded evidence could have helped Frakes rebut the conspiracy case.

V. REFUSAL TO GIVE INSTRUCTIONS

[22] The court refused three of Abascal's requested instructions and one requested by Frakes. None of these points requires extensive discussion. In Abascal's case, the instructions given were better than those requested. In

Frakes' case, another trial, if there is one, will call for new instructions in light of the evidence then before the court.

VI. EXCLUSION OF ABASCAL'S EVIDENCE ON COLLATERAL MATTERS

[23] Abascal assigns error to the court's refusal to permit him to call witnesses to impeach the surveillance team as to testimony given at the suppression hearing with reference to the evidence seized from Abascal's Cadillac and to produce and conduct an experiment on the car. All this evidence, if material, should have been offered in the suppression hearing. When offered at the trial, in an attempt to impeach the government agents, it was merely impeachment on collateral matters. *Lenske v. Knutsen,* 410 F.2d 583, 585 (9th Cir. 1969). A trial judge has wide discretion in dealing with such impeachment. *Ramirez v. United States,* 294 F.2d 277, 282 (9th Cir. 1961); *Gage v. United States,* 167 F.2d 122, 125 (9th Cir. 1948).

There was no error here in dealing with the offered evidence.

VII. PROSECUTORIAL MISCONDUCT

[24] Defendants allege prosecutorial misconduct in delayed surrender of government evidence to the defense. Even if there was prosecutorial footdragging in turning over evidence, Abascal and Frakes have shown no prejudice. *United States v. Baxter,* 492 F.2d 150 (9th Cir. 1973), *cert. denied,* 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); *United States v. Banks,* 383 F.Supp. 389 (D.S.D.1974), *appeal dismissed, sub nom. United States v. Means,* 513 F.2d 1329 (8th Cir. 1975).

With respect to fingerprint evidence, Abascal alleges that the government (1) failed to obey discovery orders, and (2)

manufactured the evidence admitted at trial. The fingerprints in question are those taken from the plastic bags and bottles found in the Cadillac.

The court ordered the prosecution to turn over all fingerprints and to make any fingerprint lifts in its possession available for microscopic examination. The government obtained both photographs and lifts of the prints. The photographs were shown to Abascal on August 3, 1973, the date ordered by the court, and were eventually admitted as evidence at trial. The government disclosed the content of the report on the lifts. The lifts and report were lost and never introduced as evidence. Discovery orders on the fingerprints were followed.

The alleged fabrication occurred on August 3, 1973, the date evidence was made available for defendant's examination. Abascal now says he handled the objects at that time and created the prints that were admitted at trial.

[25] The jury heard testimony on both sides concerning fabrication. This was evidence to be weighed by the jury in reaching their verdict. It is not within our province to reweigh these facts. *A. & G. Stevedores v. Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962).

VIII. AMENDMENT OF THE INDICTMENT

Both defendants complain about the district court's "amendment" of their indictment on the conspiracy charge. The indictment alleged:

> "[Defendants] did knowingly and intentionally combine, conspire and agree together and with each other • • • to knowingly and intentionally import, distribute and possess with intent to distribute LSD • • •."

At a pretrial hearing upon a motion, an alleged coconspirator, Demiraiakian, complained about the vagueness

of the indictment. At that hearing, the trial court noted that the conspiracy alleged in the conjunctive three illegal acts or goals. The court, without researching the issue, verbalized the theory that proper pleading should have broken up the conspiracy count into three different counts, but that since the government pleaded it in one count the court would require for conviction proof of all three elements: importation, possession, and distribution.

[26, 27] This theory was incorrect. The government may charge in the conjunctive form that which the statutes denounce disjunctively, and evidence supporting any one of the charges will support a guilty verdict. *United States v. Hobson,* 519 F.2d 765 (9th Cir.), *cert. denied,* 423 U.S. 931, 96 S.Ct. 283, 46 L.Ed.2d 261 (1975); *McGriff v. United States,* 408 F.2d 333, 334 (9th Cir. 1969). Further, while the law of conspiracy does not allow a single conspiracy which violates several laws to be charged as multiple conspiracies (*United States v. Basurto,* 497 F.2d 781, 791 (9th Cir. 1974); *Braverman v. United States,* 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942)), the government may allege a single conspiracy in several counts to meet the uncertainties of the evidence (*United States v. McKnight,* 253 F.2d 817 (2d Cir. 1958); *United States v. Maryland State Licensed Beverage Association, Inc.,* 240 F.2d 420 (4th Cir. 1957)). The district court should not have indicated preliminarily that the government had to prove all three of the objects of the conspiracy in the conjunctive.

[28] At the close of the government's case, defendants made a motion for a judgment of acquittal on the grounds of a failure to prove importation. The district court agreed that there was no evidence of importation, but simply struck the word "import" from the face of the indictment. This act, in effect, reversed the court's earlier opinion that the

government had to prove all the elements, in the conjunctive. While awkward, the court's action did not create a reversible error.

Both defendants assert that the alteration of the indictment by excising the word "import" from the conspiracy count violated the principle first enunciated in *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), that a trial court may never alter or amend an indictment. *See also United States v. Hobson, supra; United States v. Dawson,* 516 F.2d 796, 800 (9th Cir.), *cert. denied,* 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 80 (1975).

[29] The Supreme Court, however, no longer adheres to the absolute letter of the *Bain* rule (*Salinger v. United States,* 272 U.S. 542, 548-549, 47 S.Ct. 173, 71 L.Ed. 398 (1926)), and *Bain* has been limited to its facts (*Salinger v. United States,* 272 U.S. at 549, 47 S.Ct. 173; *United States v. Hobson,* 519 F.2d at 774). The current view of "amending" an indictment is that matters of form and surplusage may be "read out" of the indictment by instruction to the jury if the defendant is not prejudiced thereby. *See, e.g., United States v. Edwards,* 465 F.2d 943 (9th Cir. 1972); *Heisler v. United States,* 394 F.2d 692 (9th Cir.), *cert. denied,* 393 U.S. 986, 89 S.Ct. 463, 21 L.Ed.2d 448 (1968).

The instant case differs from *Edwards* and *Heisler* in that the alteration here was physically made on the face of the indictment. It seems anomalous, however, to allow a trial judge to water down an indictment by instructing the jury to disregard one of its allegations, yet to forbid any physical alteration on the fact of the indictment. This elevation of form over substance is wholly inconsistent with modern criminal pleading. *See* Fed.R.Crim.P. 2; 1 C. Wright & A. Miller, Federal Practice & Procedure §§ 31-32 (1969). We doubt that *Bain* has continuing validity in forbidding the physical striking of material that is patently surplusage.

As noted above, there was no need for the government to prove all three elements in the conjunctive. Accordingly, the term "import" was indeed surplusage. Defendants claim, however, that the judge's earlier statement was a ruling which made proof of that element mandatory for this case and, further, that they relied on that ruling to their detriment, orienting their defense entirely to defeating the importation count.

This argument, by these defendants, has a hollow ring. The trial judge's initial ruling simply did not apply to their cases. The motion to clarify the indictment was made only by Demiraiakian. Neither of these appellants joined the motion. Their present effort to capitalize on it is clearly an afterthought.

Eleven defendants and their attorneys presented literally dozens of pretrial motions to the trial judge. The interests of the various alleged coconspirators were not necessarily congruent. The judge insisted upon dealing with each defendant's motions in turn and passing upon each motion of each defendant to avoid confusion and misinterpretation. Even though most of the motions were repetitive, virtually identical demands for discovery orders, the judge stated on each motion that his ruling applied only to the particular defendant then before him and would apply to any others only if they specifically and explicitly made a request to join in that particular motion.

Moreover, it is highly unlikely that the defendants were in fact prejudiced by the Demiraiakian ruling. They were aware, of course, that the judge's "ruling" applied only to Demiraiakian, was given "off the cuff" and was over a year old by the time of the trial. There was ample opportunity for the defense to secure a good working knowledge of the contours of the government's case and prepare an adequate

defense to all the elements of the conspiracy charge. Those who have read thus far will have noted that the defense was thorough and that no possible point was left untouched.

IX. PREJUDICIAL PUBLICITY DURING THE TRIAL

[30] Defendants also allege error in the refusal of the trial judge to inquire of the jury as to its exposure, if any, to six newspaper articles which appeared during the two-month trial. The trial judge, of course, has the duty to detect any contaminating influences on the jurors' deliberations and take appropriate steps to rectify improprieties. *United States v. Polizzi,* 500 F.2d 856, 880-881 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). *See Silverthorne v. United States,* 400 F.2d 627, 643 (9th Cir. 1968), *appeal after remand,* 430 F.2d 675 (1970), *cert. denied,* 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed.2d 633 (1971).

[31] Here the trial judge refused to interrogate the jurors because he found that the articles were not prejudicial. Two of the articles appeared on September 6, 1974. One concerned the denial of a recusal motion and the other reported the selection of the jury. Two more appeared on October 2, 1974. The first discussed a motion to hold a witness in contempt for his alleged failure to testify truthfully during the pretrial motions. The other concerned the general problem of a faulty wiretap authorization scheme instituted by the then Attorney General. Finally, two more articles appeared on October 9, 1974. Both announced the hitherto secret indictment of Michael Green, an alleged associate of the defendants in the LSD venture, on the occasion of his plea of innocent.

The articles were, for the most part, short, routine, factual descriptions of court proceedings, appearing in the

middle and back pages of the newspapers. Two of the articles contained only tangential reference to the case and one of them was related to but one issue in this case and only in the most abstract fashion. Only the claim that this was "the largest LSD seziure ever made in this country" (also phrased as "the largest LSD case ever prosecuted in this country"), which was made in both of the September 6 articles and the October 2 contempt article, was arguably incorrect and arguably prejudicial. This does not qualify as material which is either "spectacular or inflammatory," *Gawne v. United States,* 409 F.2d 1399, 1401 (9th Cir. 1969), *cert. denied,* 397 U.S. 943, 90 S.Ct. 956, 25 L.Ed.2d 123 (1970) (pretrial publicity).

It is also true that the contents of most of the news items would have been irrelevant at trial and that there have been occasions where exposure of jurors to such evidence has been found prejudicial. *See, e.g., Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *United States v. Pomponio,* 517 F.2d 460 (4th Cir.), *cert. denied,* 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975). If any of the information in these articles was inadmissible however, it was not because of possible prejudice but because of simple lack of relevancy. We cannot say that the trial judge abused his discretion. There was no prejudice, and no basis for a new trial.

X. CONCLUSION

The judgment against Abascal is affirmed. The judgment against Frakes on the conspiracy count is affirmed. The judgment against Frakes on the substantive counts is reversed and remanded.

Appendix B

United States Court of Appeals
for the Ninth Circuit

FILED
DEC 2 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, *Appellee,* v. MANUEL GLENN ABASCAL, *Appellant.*	No. 75-1093
UNITED STATES OF AMERICA, *Appellee,* v. PAUL GORDON FRAKES, *Appellant.*	No. 75-2052

Appeal from the United States District Court
for the Southern District of California

Before: TRASK, GOODWIN, and WALLACE,
Circuit Judges.

ORDER

On petition for rehearing, Abascal claims that he is entitled to the same relief granted Frakes because of the trial court's error in excluding the portions of the tapes the government succeeded in keeping out after playing the parts the government wanted the jury to hear. While Abascal did not raise the point in his voluminous brief, and

thus technically did not bring it before us on his appeal, he did object at the time of the trial court's ruling. The exclusion of the defense evidence, however, did not affect Abascal as much as it affected Frakes.

Abascal did indeed use code words in his calls to Petroff. But the frequency, pattern, and content of the calls and their direct and obvious relationship to other overt acts undertaken on behalf of the conspiracy drastically reduced the significance of that fact as part of the government's case. We are satisfied that, given the limited evidentiary purpose of these tapes, their exclusion did not substantially prejudice the fairness of Abascal's trial. *United States v. Puchi,* 441 F.2d 697, 702 (9th Cir.), *cert. denied,* 404 U.S. 853 (1971).

The other points urged in the appellants' petitions for rehearing present nothing new and no basis for further modification of our judgment. The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc. The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested en banc consideration.

Abascal's petition for rehearing with suggestion for rehearing en banc, filed March 31, 1977, and Frakes' petition for rehearing with suggestion for rehearing en banc, filed April 7, 1977, are both denied as to the petitions for rehearing and rejected as to the suggestions for rehearing en banc.

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